No. 20,292

IN THE

United States Court of Appeals

For the Ninth Circuit

KENNETH R. RICKEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

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2. The Government Agents Deceived Appellant as to the Nature and Purpose of the May 14 Meeting.
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1. THE INVESTIGATION WAS FAR PAST ITS "INCIPIENT STAGES" AT THE TIME OF THE MAY 14 MEETING, AND THE ACCUSATORY STAGE HAD BEEN REACHED.

It is the Government's position that the accusatory stage of the proceedings against appellant had not yet been reached at the time of the May 14 meeting. Indeed, the Government suggests that the investigation did not reach the accusatory stage until the special agent's superiors reviewed the case or until the grand jury finally returned the indictment (Appellee's Brief, pp. 11-12). If the Court agrees with this argument, the right to counsel guaranteed by the Sixth Amendment will be of little or no protection to taxpayers accused of fraud.

Examinations directed at determining civil tax liability are ordinarily commenced and conducted by internal revenue agents, such as Revenue Agent Barr. Only when facts are discovered indicating probable fraud, does a special agent of the Intelligence Division enter the case. *U.S. v. Wolrich,* 129 F.Supp. 528 (S.D. N.Y. 1955). At that point, the whole focus of the investigation undergoes a radical change: It becomes primarily concerned with obtaining evidence that will support criminal charges against the taxpayer, and the determination of the taxpayer's civil liability is entirely subordinated to this purpose. From that point on, as long as a special agent is involved, he is in charge. He and his superiors continue in charge until the criminal aspects of the matter have been disposed of, and during that time neither discussion nor settlement of the civil case is possible. Murphy, *The*

Investigative Procedure for Criminal Tax Evasion, 27 Fordham L. Rev. 48, 58-59 (1958).

In some cases a special agent participates in the investigation from the outset. This occurs, for example, when an informer has provided information to the Government. In other cases, a special agent may enter an investigation after an examination has been commenced but before the existence of a substantial tax deficiency has been established. But in this case, when Special Agent Mott entered the investigation Revenue Agent Barr had already ascertained that Rickey had omitted from his 1960 tax return stock sales approximating $102,000, and Barr had passed this information on to Mott as a basis for a possible criminal charge.

The Government argues that the constitutional right to counsel has not been held to attach "to the incipient stages of such an investigation" (Brief, p. 12). But this investigation was far beyond any "incipient stage." The first element of the felony offense of tax evasion had already been established, *viz.,* the existence of a substantial tax deficiency. Only the element of wilfulness remained to be proved, and this was exactly what Mott proposed to do. His primary purpose in arranging the meeting, as he admitted at the trial, was to obtain incriminating statements from Rickey (R.T. 253, lines 2-5).

Barr, acting under Mott's direction, called Rickey and arranged for his presence at the May 14 meeting in such a manner as to avoid alerting Rickey to the

significant change that had occurred in the nature of the proceedings. He deliberately led Rickey to believe that the meeting was being held to afford Rickey an opportunity to file an amended return and pay additional tax. Mott then made the arrangements necessary to record secretly what was said at the conference.

While the secret taping of the May 14 meeting may not (as appellee argues at page 13 of its Brief) change the context in which Rickey's statements were made, the fact that Special Agent Mott saw fit to make the recording, and to make it secretly, is eloquent testimony to the stage the proceedings had then reached. Mott's supposed desire to obtain an accurate recording of the conference (Appellee's Brief, pages 12-13) affords no explanation for the elaborate secrecy of the maneuver, any more than do his other explanations, namely, that he wanted to test the equipment, and that he wanted to protect himself from a possible false charge that he had threatened or abused Rickey (who was present, by himself, at a conference with three Government agents) (R.T. 370).

Under cross-examination, Mott was forced to admit that all of these alleged purposes could have been served equally well if he had told Rickey he was recording the conference (R.T. 371-372). His true reason for making the recording secretly, as he finally admitted (R.T. 372, lines 11-21; 374, lines 16-19) was to establish Rickey's inconsistency if he made later statements covering the same subject matter. The purpose was directed squarely toward obtaining the

evidence of wilfulness necessary to prove the criminal offense. Mott had reached the accusatory stage in his investigation of Rickey.

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2. THE GOVERNMENT AGENTS DECEIVED APPELLANT AS TO THE NATURE AND PURPOSE OF THE MAY 14 MEETING.

Appellee in its brief (page 13) asserts that ". . . appellant was fully and honestly informed of the situation" on May 14, that "There is nothing deceitful about the use of the tape" and that "There was no deceit." On the contrary, the evidence showed that the Government agents deliberately deceived Rickey into coming to the conference room in the mistaken belief that he would be meeting with Revenue Agent Barr and his superior for the purpose of filing an amended return for the year under audit so that he could pay the additional tax owing, when in fact he was about to be interrogated and his answers recorded without his knowledge for the specific purpose of constructing a criminal case against him.

Mott knew that Barr's last communication with Rickey concerned the filing of an amended return and the paying of a deficiency (R. 362). Mott then had Barr arrange the meeting, to avoid tipping Rickey off to the fact that he was under criminal investigation. He wanted Rickey to commit himself to statements before he realized the seriousness of the investigation and consulted an attorney. In addition, Mott directed Barr to have Rickey come to the only conference room he knew was "bugged."

Although Mott briefly displayed his credentials at the conference, he did not adequately introduce himself. He did not mention the fact that as a special agent of the Internal Revenue Service he was concerned primarily with criminal investigations, and did not tell Rickey that he was under criminal investigation. He did not even mention the words "crime" or "fraud" (R. 262).

Mott had previously equipped the conference room with a hidden microphone. Prior to the meeting with Rickey, he connected the microphone with a tape recorder, which he installed in a room across the hall. The Government would have the Court believe that this was a "last minute decision", but Mott testified that to complete his preparations before Rickey arrived, he had to run an additional wire through the hall, out a window and into an adjoining room (R. 368). He also had to obtain the services of a second special agent to operate the recorder (R. 376). If it was a "last minute decision", it was still a well-considered one.

Appellee makes much in its brief (pp. 5-6, 13) of the fact that appellant is an educated and experienced businessman. The evidence, however, is uncontradicted that appellant was not aware at the May 14 conference that he was under criminal investigation (R. 288). The evidence also demonstrates that Special Agent Mott and Revenue Agent Barr sought to keep appellant in this state of ignorance. Appellant's constitutional rights should not be contingent upon speculation as to how much he inferred from Mott's vague

self-introduction. Even an experienced businessman should not be presumed to understand the significance of the distinction between a revenue agent and a special agent, a distinction of which many attorneys, and even some judges, are not aware. Nor should the Court assume that appellant's education and experience adequately prepared him for the May 14 conference. No man should be made to act as his own attorney at such a confrontation.

Even assuming, for the purposes of argument, that appellant was effectively put on notice that he was the subject of a criminal investigation, the only bearing such knowledge would have would be on the issue of the Government agents' deceit; it would not affect appellant's right to counsel once the accusatory stage had been reached. The record is devoid of any evidence to support a conclusion that appellant competently and intelligently waived his right to counsel (*Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1018 (1938); see Appellant's Opening Brief at pages 27 and 28).

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3. THE FACTS IN THE CASE AT BAR DISTINGUISH IT FROM KOHATSU v. UNITED STATES.

Appellee contends that *Kohatsu v. United States,* ..... F.2d ....., No. 19,738, decided October 22, 1965, by the Ninth Circuit Court of Appeals, is dispositive of this appeal. We do not agree.

In *Kohatsu,* appellant argued that the accusatory stage is reached in a tax fraud investigation when:

involves acts of deception which occurred after the special agent had entered the case.

In *U.S. v. Wolrich,* 129 Fed.Supp. 528 (S.D.N.Y. 1955), the Court ordered a hearing to determine whether the Government agents had fraudulently obtained permission to examine the taxpayer's books and records, where there was evidence indicating that when the revenue agent represented to the taxpayer that his investigation was "routine", the special agent already had entered the case.

The situation in the case at bar thus is similar, not to *Sclafani,* but to *Wolrich.* Here the Government agents deceived appellant as to the nature and purpose of the May 14 meeting. The use of the hidden tape recorder itself was an act of stealth and trickery. Any warning inherent in the revenue agent's investigation was successfully muted by the Government agents' deceit.

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4. DICTUM CONTAINED IN THE KOHATSU DECISION IS ERRONEOUS AND SHOULD BE CORRECTED.

Kohatsu does not control the case at bar, because of differences in the facts and in the contentions advanced by the appellants.[1] Moreover, the opinion of the Court in *Kohatsu* ranged far beyond the narrow question presented.

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[1]Should the division hearing this appeal at bar, however, be of the opinion that the opinion in *Kohatsu* controls the appeal at bar, we respectfully suggest that the panel take the necessary steps for a hearing *en banc. Ellis v. Carter,* 291 F.2d 270, 273, Note 3 (9th Cir. 1961).

In *Kohatsu* the Court held that the proceeding had not reached the accusatory stage within the meaning of the Supreme Court's decision in *Escobedo* and made the following observation, which we regard as dictum:

> "In taking the phrase 'focus on a particular suspect' out of context, appellant would extend the rule of *Escobedo* beyond any logical implication of the effect of that decision. The Supreme Court in *Escobedo* referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed. The accused had not been indicted or arrested." *Kohatsu, supra,* at page 6.

If this means that the accusatory stage is not reached in a tax investigation until (a) the Government agents have determined that a crime has been committed, or (b) the accused has been indicted or arrested, we respectfully suggest that the Court's reasoning is erroneous.

The Court's comments regarding the nature of the investigation in *Kohatsu* apply equally to almost all investigations of suspected tax evasion. As the Court noted in *Kohatsu,* such investigations differ from the usual police inquiry (see also Appellant's Opening Brief at pp. 20-21). It is almost invariably true in tax cases that the identity of the taxpayer is known from the beginning, that the purpose of the investigation

is to determine whether he has committed a criminal offense, and that the accused taxpayer is not taken into custody until after indictment.

To apply the rule of *Escobedo* in such a way as to conclude that the right to counsel is not present in tax cases until the special agent has concluded that a crime has been committed, or perhaps until the taxpayer has been indicted or arrested, would emasculate the Sixth Amendment's guarantee to an accused of the assistance of counsel "at every step of the proceedings against him" [*Powell v. Alabama,* 287 U.S. 45, 69 (1932)], in all criminal cases involving administrative investigations.

Surely if Escobedo had acknowledged the fact that he had shot diGerlando, but had claimed that he acted in self-defense or as a result of temporary insanity, the accusatory stage of the proceeding would still have been reached during the police station interrogation described in that case. But the dictum in *Kohatsu* would indicate a contrary conclusion, because there could have been no "crime" committed unless Escobedo had the requisite intent and capacity. Similarly, in an investigation of a suspected conspiracy to violate the anti-trust laws, the right to counsel guaranteed by the Sixth Amendment may well mature before the Department of Justice concludes that a crime in fact has been committed.

The trouble is that the dictum in *Kohatsu* argues too much. The right to counsel should not be held to await a final determination by the authorities that a "crime" has been committed, but should be held to

mature when the criminal investigators discover facts indicating that a crime has been committed, the events and transactions constituting the suspected crime are established with particularity, and the investigators begin to interrogate the chief suspect in order to accumulate evidence of guilt.

Similarly, the suggestion in *Kohatsu* that the right to counsel may not mature until the accused has been indicted or arrested is a conclusion not warranted by the reasoning of the Supreme Court in *Massiah* and *Escobedo*. Although it is true that the defendant in *Massiah* had been indicted, and the defendant in *Escobedo* had been taken into custody, it does not follow that the right to counsel is guaranteed only after indictment or arrest.

A careful reading of the Supreme Court's opinion in *Escobedo* reveals that, contrary to appellee's assertion in its brief (page 12), the Court was not concerned solely with the potential for coercion implicit in secret, unwitnessed police interrogations. If that had been the Court's sole concern, it could have elaborated the "voluntary confession" doctrine under the due process clause of the Fourteenth Amendment by, for example, requiring affirmative proof by the prosecution, through the testimony of a disinterested on-the-spot witness, that no coercion was used. Instead, the Court in *Escobedo* pointed out the evidence with which the police confronted Escobedo during the interrogation, and noted that in such a situation an accused would be motivated to speak because silence would be considered an admission of guilt and because

he would want to remove suspicion from himself by denying the accusations. The Court then declared:

> "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. This was the 'stage when legal aid and advice' were most critical to petitioner. . . . What happened at this interrogation could certainly 'affect the whole trial,' . . ." *Escobedo v. Illinois,* 378 U.S. at 486, 84 S.Ct. at 1762.

For appellant Rickey to have remained silent or to have refused to cooperate with the agents during the May 14 interrogation similarly would have been suspicious. The questions asked and the admissions secured by Special Agent Mott on that occasion were as crucial in Rickey's case as the police interrogation in *Escobedo.* When Rickey arrived at that conference, unaware that he was under criminal investigation and that his answers were being recorded for use against him at his subsequent trial, his need for the assistance of legal counsel was as great as that of Danny Escobedo when he was under police interrogation.

The fact that an accused is not in custody should not preclude his right to counsel. See Enker and Elsen, *Counsel for the Suspect,* 49 Minn. L.Rev. 47, 75-76 (1964).

> "Counsel does not only serve the function of providing technical aid; he is also a needed buffer at the point of confrontation between the state and the accused, put there because the accused is incapable of defending himself in this moment of stress. When the Bill of Rights was put into effect, its draftsmen recognized that the crucial

point of confrontation was at trial. The investigative process, on the other hand, was private; state and accused did not meet until the trial. Now the investigative process is in the hands of the state, and the state and the accused meet during interrogation . . . *If the standards of the Framers are to be enforced in modern times, these standards must be applied at the critical point in the criminal process, no matter where in the process that critical point moves.* Comment, *Counsel at Interrogation,* 73 Yale L.J. 1000, 1048" (Emphasis added).

In re Groban, 352 U.S. 330, 77 S.Ct. 510 (1956), decided nearly ten years ago, upheld by a five to four vote the power of an Ohio fire marshal to interrogate the prime suspects in an "administrative investigation" of suspected arson. There, as here, those interrogated were not in custody at the time of interrogation; there, as here, the purpose of the interrogation was to determine whether a crime had in fact been committed; there, as here, the accused claimed a denial of counsel.

In dissenting in that case, Mr. Justice Black stated:

"It may be that the type of interrogation which the Fire Marshal and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of counsel. It is quite possible that the conviction of a person charged with arson or

> a similar crime may be attributable largely to his interrogation by the Fire Marshal. The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pre-trial examination. 352 U.S. at 344, 77 S.Ct. at 519.
>
> ". . . (T)he Fire Marshal's interrogation is, and apparently was intended to be, an important and integral part in the prosecution of the persons for arson or a similar crime. The rights of a person who is examined in connection with such crimes should not be destroyed merely because the inquiry is given the euphonious label 'administrative.'" *Id.* at 349, 521.

We submit that the dissenting opinion of Mr. Justice Black is now the majority view of the Supreme Court. The majority opinion of the Court in *In re Groban* balanced the right to counsel against the public interest in fire prevention in order to determine whether the deprivation of counsel was contrary to "fundamental principles of liberty and justice." 352 U.S. *supra,* at 344, 77 S.Ct. at 514. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792 (1962) undermined such a balancing test by holding the right to counsel itself to be one of the "fundamental rights" of the Constitution.

In *Hannah v. Larche,* 363 U.S. 420, 80 S.Ct. 1502 (1960), Southern voting registrars challenged the constitutionality of the procedural rules of the Civil Rights Commission. In upholding the Commission's rules, the Court took care to describe the Commission's functions as investigative and fact-finding for

legislative, as opposed to *adjudicative,* purposes. *Hannah v. Larche, supra,* 363 U.S. at 441, 80 S.Ct. at 1514. Although the Commission cited *In re Groban* in support of its position, the Court declined to discuss the case, commenting with regard to *In re Groban* and its companion case, *Anonymous v. Baker,* 360 U.S. 287, 79 S.Ct. 1157 (1956): "Each of us who participated in those cases adheres to the view which he subscribed therein." *Hannah v. Larche, supra,* 363 U.S. at 451 Note 31, 80 S.Ct. at 1915 Note 31.[2] Finally, the majority opinion of *Escobedo,* which the four Justices dissenting in *In re Groban* joined, cited Mr. Justice Black's dissenting observation that the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination." *In re Groban, supra,* 352 U.S. at 344, 77 S.Ct. at 519, cited in *Escobedo v. Illinois, supra,* 378 U.S. at 487-488, 84 S.Ct. at 1763.

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[2]The concurring opinion of Mr. Justice Frankfurter in *Hannah v. Larche, supra,* 363 U.S. at 486, 80 S.Ct. at 1542, suggests a possible distinction between *In re Groban* and the appeal at bar. He stated that in *In re Groban* "the essential purpose of the Fire Marshal's inquiry was not to adjudicate individual responsibility for the fire but to pursue a legislative policy of fire prevention through the discovery of the origins of fires." *Hannah v. Larche, supra,* 363 U.S. at 491, 80 S.Ct. at 1545. The contrary is true of the case at bar. Special Agent Mott's inquiry was an essential part of a process for adjudicating appellant's responsibility under the tax laws.

5. IRWIN v. UNITED STATES AND U. S. v. KONIGSBERG ARE NOT APPLICABLE TO THE CASE AT BAR.

Irwin v. United States, 338 F.2d 770 (9th Cir. 1964), cited by the Government at page 10 of its brief, is not comparable to the case at bar. In that case, the defendants claimed that the right to counsel attached in two instances. The second was at a conference at which the defendant's counsel was present. The first occurred when a postal inspector submitted by mail to appellants an invitation for an offer, in order to determine whether they were then engaged in an unlawful activity. The Court has never held it to be a deprivation of a constitutional right for a law enforcement officer to make inquiry in order to determine whether a crime is then being committed. Cf. *Lopez v. United States,* 373 U.S. 427, 83 S.Ct. 1381 (1963).

In *United States v. Konigsberg,* 336 F.2d 844 (3rd Cir. 1964), also cited by the Government, the trial court specifically found, after disputed testimony, that the defendant had been advised of his right to counsel. In the case at bar it is undisputed that appellant was not so advised.

CONCLUSION

The judgment of the District Court should be reversed and a new trial granted.

Dated, Oakland, California,
November 24, 1965.

Respectfully submitted,
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney.